No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a national consumer advocacy organization founded in 1971. Public Citizen appears on behalf of its members and supporters before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen has a strong interest in preventing the unwarranted expansion of defenses that shield anticompetitive practices that harm consumers and often represents consumer interests in litigation before this Court.[2]

Public Citizen also has a longstanding interest in the proper construction of statutory provisions and common-law rules defining and limiting the jurisdiction of federal trial and appellate courts, including this Court. Public Citizen has frequently appeared as an amicus before this Court in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[3]

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented in writing to the filing of this brief.

[2] *See, e.g.*, *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

[3] *See, e.g.*, *Cyan v. Beaver Cty. Empls. Ret. Fund*, No. 15-1439 (pending); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007). In addition, Public Citizen Litigation Group was also counsel for the respondent in *Will v. Hallock*, 546 U.S. 345 (2006).

Public Citizen submits this brief to explain why the collateral order doctrine does not authorize interlocutory appellate jurisdiction over district court decisions denying motions to dismiss based on a defendant's failure to satisfy the "state-action" defense to antitrust liability that this Court announced in *Parker v. Brown*, 317 U.S. 341 (1943). A contrary holding would risk expanding the collateral order doctrine beyond the "small class," *Will v. Hallock*, 546 U.S. 345, 349 (2006), of interlocutory orders currently authorized for immediate appellate review.

SUMMARY OF ARGUMENT

The collateral order exception to the final judgment rule authorizes interlocutory appeals from a small category of orders: those that conclusively determine disputed questions, resolve important issues completely separate from the merits of the action, *and* are effectively unreviewable on appeal from a final judgment. In this case, the question is whether a district court decision denying a motion to dismiss based on the so-called *Parker* state-action defense to antitrust liability is among this small category. As explained below, it is not.

Parker held that actions properly attributable to states are not subject to the Sherman Act. *Parker*, 317 U.S. at 350-51. Accordingly, a motion to dismiss a Sherman Act claim under *Parker* is based on the argument that the conduct alleged in the complaint did not violate the Act. An order denying a motion to dismiss under *Parker*, like denial of any motion to dismiss, is an interlocutory order. Unlike the few such denials that qualify for appeal under the collateral order doctrine, an order declining to dismiss a case

under *Parker* is effectively reviewable after final judgment.

An order is effectively unreviewable only if the absence of immediate appellate review would imperil an important right of substantial public interest that cannot be vindicated on appeal from final judgment. When a court declines to dismiss a claim against a defendant, an appeal after final judgment will fully vindicate the defendant's rights unless the defendant has a right to be free, not only from liability but from trial, even if its conduct is unlawful.

Parker does not exempt a defendant from trial for unlawful conduct; where the defense applies, it is a basis for finding that the defendant's conduct is not unlawful at all. A district court's rejection of a *Parker* defense, like the rejection of a city's defense to municipal liability based on the argument that alleged wrongful conduct was not attributable to a city's policy, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1968), can be adequately vindicated on appeal from final judgment. Delaying appellate review of such a merits defense until after final judgment imperils no important right of substantial public interest. To the contrary, the interests put forth by petitioner here have all been rejected by this Court as grounds for allowing immediate appeal.

That denial of a motion to dismiss based on *Parker* can be effectively reviewed on appeal from a final judgment is sufficient to dispose of this case. Other reasons, however, also support denying an immediate appeal here. Denial of a motion to dismiss that turns on facts related to whether and how the *Parker* defense's requirement that anticompetitive conduct be actively supervised by the state applies to a specific

entity is inherently non-final and particularly ill-suited to collateral order review.

ARGUMENT

I. The collateral order doctrine is a narrow exception to the final judgment rule.

Since the first Judiciary Act of 1789, Congress has strictly limited appeals as of right within the federal courts to appeals from "final de[c]isions of the district court." 28 U.S.C. § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).

The final judgment rule represents a prudent allocation of the courts' time and authority. By consolidating in one appeal all grounds for challenging a trial court's judgment, the rule avoids delay, promotes efficient judicial administration, and reduces the ability of litigants to harass opponents by engaging in a succession of time-consuming and costly appeals. And because many cases settle or are resolved on other grounds in favor of the potential appellant, the rule avoids many appeals entirely. For these reasons, "the policy of Congress embodied in [section 1291] is inimical to piecemeal appellate review of trial court decisions." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

At the same time, Congress has made exceptions in situations where the final judgment rule embodied in section 1291 would "create undue hardship." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). One such statute is 28 U.S.C. § 1292(b), which provides for

discretionary certification by the district court and discretionary acceptance by the court of appeals of important, non-final questions of law. Indeed, here, petitioner moved for certification under § 1292(b), although the district court exercised its discretion to deny the motion. Other statutes make exceptions to section 1291 for specific subjects, such as certain orders relating to arbitration. *See, e.g.*, 9 U.S.C. § 16(a)(1)(A). And this Court may, through the rulemaking process, designate categories of orders that may be appealed before final judgment and define the conditions under which such appeals may be permitted. 28 U.S.C. §§ 1292(e), 2072(c).

Where Congress or the rulemaking process has not provided for a specific exception to section 1291, this Court has allowed immediate appeals from only a "small class" of "collateral" interlocutory orders. *Will*, 546 U.S. at 349. The collateral order doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), imposes three "stringent" requirements for membership in that small class—the order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)).

In light of the language of section 1291 and the longstanding policy against piecemeal appellate review, this Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital*, 511 U.S. at 868. Thus, "the conditions for collateral order

appeal [are] stringent," and "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Id.* (internal quotation marks and citation omitted).

II. Denial of a motion to dismiss based on *Parker* is not an appealable final order.

A. To be immediately appealable, a collateral order must be "effectively unreviewable" after final judgment.

"[W]hen asking whether an order is 'effectively' unreviewable if review is to be left until later," *Will*, 546 U.S. at 353, under *Cohen*'s third prong, this Court has explained that there must be "some particular value of a high order ... in support of the interest in avoiding trial," or some "compelling public ends ... that would be compromised by failing to allow immediate appeal." *Id.* at 352. The value at stake must be such that, "in the absence of an immediate appeal," it would be "irretrievably lost." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985).

The key teaching of the Court's recent cases applying this requirement is not, as petitioner asserts (at 28-30), that the necessity of invoking a right to avoid trial or some equivalent interest that cannot be vindicated after final judgment has been replaced by an ad hoc inquiry into whether an issue is sufficiently "important" to merit immediate appeal. Rather, the right must meet both criteria: It must be one that will be lost absent immediate appeal *and* must be important enough to displace the values incorporated in the final judgment rule. Where the interest said to

justify appeal is in avoiding trial, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest" that makes "an order 'effectively' unreviewable if review is to be left until later." *Will*, 546 U.S. at 353.

Thus, in *Digital*, the defendant argued that a district court decision vacating a settlement agreement was immediately appealable, because, in the defendant's view, the *only* requirement for satisfying *Cohen*'s third prong was a "right not to stand trial" that could not be vindicated absent immediate appeal—a right that the defendant claimed the settlement agreement provided. 511 U.S. at 871. This Court disagreed, explaining that the contention that the "right not to stand trial" is "sufficient as well as necessary" is not an "accurate distillation" of the Court's collateral order precedents. *Id.* Instead, the Court held that a defendant seeking an immediate appeal based on an asserted right not to stand trial must *also* establish "the 'importance' of the right asserted [as] an independent condition of appealability." *Id.* at 875. Accordingly, although a provision in the private agreement could be said to provide "immunity from suit," *id.* at 877, which would be lost without interlocutory review, immunity based on a settlement agreement did not "qualif[y] as 'important' in *Cohen*'s sense." *Id.* at 879.

Will reflects the same approach. In *Will*, the Court held that agents of the United States in a *Bivens* action were not entitled to interlocutory appellate review of a decision denying a motion to dismiss based on the judgment bar of the Federal Tort Claims Act because the importance prong was not satisfied. 546 U.S. at 355. The lesson of *Will* is not that a right not

to be tried is not *necessary* for interlocutory appeal, but that it is not *sufficient*. As the Court explained, "only some orders denying an asserted right to avoid the burden of trial qualify"; the entitlement to immediate appeal depends on a "*further* characteristic that merits appealability," namely, "the value of the interest that would be lost" without immediate appeal. *Id.* at 351–52 (emphasis added). Because the defense at issue involved the same interests served by "traditional res judicata," *id.* at 354, which has never "been thought to protect values so great that only immediate appeal can effectively vindicate them," *id.* at 355, the Court concluded that the asserted right to avoid trial was not important enough to merit immediate appeal, *see id.*

By contrast, in *Mohawk Industrial, Inc. v. Carpenter*, 558 U.S. 100 (2009), the Court found an important interest, but held that the collateral order doctrine did not apply because that interest could be vindicated after final judgment. There, the district court had ordered disclosure of material that the petitioner claimed was protected by the attorney-client privilege. The Court held that, although the "right not to disclose [attorney-client] privileged information" is "important," *id.* at 108, the right does not satisfy *Cohen*'s third prong because it is a right that can be protected in a postjudgment appeal "by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence," *id.* at 109.

Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 502 (1989), on which petitioner focuses, is fully consistent with the opinions discussed above, which hold that assertion of a right not to stand trial remains

necessary, but not sufficient, to satisfy the collateral order doctrine's requirement that an appeal of a denial of a motion to dismiss involve a right that is effectively unreviewable after final judgment. In *Lauro*, the Court unanimously held that denial of a motion to dismiss based on a forum selection clause was not immediately appealable under the collateral order doctrine because, as the Court's opinion stated, the right asserted was "different in kind" from a right to "avoid suit altogether," and thus failed to satisfy the third *Cohen* element. *Id.* at 501.

Justice Scalia joined the opinion of the Court and also wrote separately to note that *in addition* to considering whether the right would be imperiled by trial, the Court had also implicitly considered its importance. *Id.* at 502 (Scalia, J., concurring). Reasoning that the defendant arguably had a "right not to be tried" that would be irretrievably lost without an immediate appeal, Justice Scalia explained that the right was "not sufficiently important to overcome the policies militating against interlocutory appeals." *Id.* Although petitioner claims that Justice Scalia's concurrence marked a "turning point" in the collateral order doctrine, Pet. Br. 29, the concurrence did not imply that importance alone could render a ruling appealable. Rather, to be immediately appealable, the interlocutory ruling must involve a right that *not only* would be lost irreparably absent immediate appeal, but also is "*important enough* to be vindicated by, as it were, an injunction against its violation obtained through interlocutory appeal." *Id.* (emphasis added).

In sum, this Court has consistently required a defendant invoking the collateral order doctrine to

appeal a court's refusal to dismiss an action against it to show *both* that it has a right not to stand trial *and* that the right is important enough to overcome the strong policy against interlocutory appeals. Absent such a showing, the right does not satisfy the "effectively unreviewable" criterion.

Like the orders in the cases discussed above, an order denying a motion to dismiss under *Parker* does not satisfy this requirement. The *Parker* defense is neither a right not to be tried nor sufficiently important to "overpower the substantial finality interest § 1291 is meant to further." *Will*, 546 U.S. at 349. Rather, as discussed below, reliance on the *Parker* defense is an assertion that the defendant is not liable under the law and, in that way, resembles a run-of-the-mill motion for failure to state a claim. Like most such motions, denial of a *Parker* motion to dismiss is effectively reviewable after a final judgment.

B. Like the *Monell* doctrine, *Parker* is a defense to liability, not a right to avoid trial.

"'[A] mere defense to liability' ... may be reviewed effectively on appeal from final judgment." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42, 44 (1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). This Court has never held that a defense whose essence is that the defendant's challenged conduct was not unlawful—a quintessential merits defense—can support a collateral order appeal. *Parker* is such a defense and, like the defense to municipal liability for civil rights violations this Court announced in *Monell*, 436 U.S. at 694, it can be adequately vindicated on appeal from final judgment.

Local governments are not immune from suit under 42 U.S.C. § 1983 for constitutional violations. *See Owen v. City of Indep.*, 445 U.S. 622, 650, 657 (1980). However, under *Monell*, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents" based on *respondeat superior*. *Id.* To hold "the government as an entity ... responsible," a plaintiff must show that the injury was inflicted pursuant to some "policy or custom." *Id.* *Monell* provides local governments a defense to § 1983 liability in circumstances where this Court has determined that they have not behaved unlawfully.

In *Swint*, this Court held that denial of a public entity's *Monell* defense is not immediately appealable under the collateral order doctrine. 514 U.S. at 42-43. Rejecting the argument that *Monell* "should be read to accord local governments a qualified right to be free from the burdens of trial," *id.* at 43, this Court held that the nonexistence of a government policy or custom "ranks as a 'mere defense to liability'" that "may be reviewed effectively on appeal from final judgment," *id.* (quoting *Mitchell*, 472 U.S. at 526).

Parker, like *Monell*, is a defense that limits the scope of certain defendants' liability, and it does so by limiting the circumstances in which they can be found to have behaved unlawfully under the Sherman Act. *See S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 71 (1985) ("In the *Parker* case, this Court held that the Sherman Act does not reach 'state action or official action directed by a state.'" (citation omitted)). In *Parker*, the Court considered whether a stabilization program designed by the California legislature to control the price of raisins was unlawful under the Sherman Act. 317 U.S. at

350. After assuming both that the California program "would violate the Sherman Act" if conducted by private persons, and that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce," the Court considered whether Congress had intended the Sherman Act to reach state action. *Id.*

In making this determination, the Court invoked what has subsequently become known as the "clear statement rule." *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks and citations omitted)). In *Parker*'s words, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. After reviewing the text, legislative history, and purpose of the Sherman Act, the Court concluded that Congress had not explicitly manifested an intent that the Act apply to the states and, therefore, held that the Sherman Act does not apply to state action. *Id.* at 350-51; *see City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374 (1991) (describing *Parker* as holding that "the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators"). Under *Parker*, anticompetitive actions of substate public entities, and even private entities, may also fall outside the Sherman Act's prohibitions if they (1) are authorized by an affirmative state policy to displace competition and (2) are either actively supervised by

the state or engaged in by municipalities, which the Court has excused from the active supervision requirement. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39-40, 46-47 (1985).

Petitioner and its amici insist that because the word "immunity" has sometimes been used to describe the *Parker* defense, it necessarily follows that an order denying a motion to dismiss on *Parker* grounds is appealable. But the word "immunity" is not a talisman that automatically enables a collateral order appeal, and all defenses that can be termed immunities are not identical. Importantly, *Parker* did not hold state actors immune from trial for unlawful conduct, or even from liability for unlawful conduct. It held that, because their conduct is not covered by the Sherman Act when the requirements of the defense are satisfied, it is not unlawful at all.[4]

The *Parker* defense is thus fundamentally different from "immunities" for which collateral order appeals are available. The kinds of "immunities" that have given rise to proper collateral order appeals are "a rare form of protection," *Digital*, 511 U.S. at 880, that provide a defendant with an exemption from trial

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[4] Notably, although courts today sometimes use the shorthand term "*Parker* immunity," *Parker* itself did not use the word "immunity." And as the United States has noted, this Court first used the term "*Parker* immunity" in 1978, more than thirty years after issuing the decision. *See* Brief for the United States as Amicus Curiae at 14-15 & n.3, *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017) (No. 15-17302). The Court has alternatively referred to the "*Parker* defense." *See City of Columbia*, 499 U.S. at 372; *Hallie*, 471 U.S. at 39; *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978).

for *unlawful* conduct, *see Mitchell*, 472 U.S. at 527-28 (describing qualified immunity as "an entitlement not to be forced to litigate the consequences" of allegedly unlawful conduct); *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (explaining that qualified immunity shields government officials from being held legally accountable for "allegedly *unlawful* official action" unless their conduct violates "clearly established statutory or constitutional rights." (internal quotation marks and citations omitted; emphasis added)); *Butz v. Economou*, 438 U.S. 478, 506 (1978) (describing absolute immunity for federal officials as an "exemption from personal liability for *unconstitutional* conduct" (emphasis added)).

In short, entities or officials cloaked with these "immunities" are exempt from being held accountable through trial for conduct that is unlawful. By contrast, conduct that falls within the *Parker* defense is not unlawful. As the Court held in *Swint*, 514 U.S. at 43, a defendant that argues that its conduct is not unlawful under the relevant statute does not claim a special exemption from the burdens of the legal process that could justify invocation of the collateral order doctrine. Rather, the assertion of such a defense is akin to any other assertion that the plaintiff has failed to state a claim that the defendant has engaged in actionable wrongful conduct. This Court has never held that such a claim merits an interlocutory appeal. *See Digital*, 511 U.S. at 873.

C. Awaiting final judgment to appeal denial of a motion to dismiss based on *Parker* does not imperil an important right of substantial public interest.

As explained above, even where a claimed right would arguably be lost without immediate appeal, "whether a right is ... 'effectively reviewable' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Mohawk*, 558 U.S. at 106 (quoting *Digital*, 511 U.S. at 878-79). This Court has therefore limited application of the collateral order doctrine to instances where "delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Id.* (quoting *Will*, 546 U.S. at 352-53). "The crucial question ... is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id.* at 108-09.

Where a right "has no claim to greater importance than the typical defense[,] ... an order rejecting the defense ... cries for no immediate appeal of right as a collateral order." *Will*, 546 U.S. at 355. As discussed above, *Parker*, like *Monell*, is a defense "merely that the complaint fails to state a claim," which "can be made in virtually every case." *Digital*, 511 U.S. at 873. To extend the definition of "importance" to this situation would mean that, "[i]n effect, 28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Will*, 546 U.S. at 353 (denying application

of the collateral order doctrine for government officials on grounds unrelated to qualified immunity).

Petitioner's invocation of "state sovereignty and federalism," Pet. Br. 32-35, is inapposite because cities and other substate and private entities that typically invoke *Parker* "are not themselves sovereign." *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978); *see also Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983."); *Mich. Dep't of State Police*, 491 U.S. at 70 (noting that "States are protected by the Eleventh Amendment while municipalities are not"); *Hallie*, 471 U.S. at 38.[5] In addition, petitioner's "state sovereignty and federalism" interests would be the same had it raised and the district court denied a defense that the court lacked personal jurisdiction, that the statute of limitations had run, or that the action was barred on claim preclusion principles—none of which is sufficient to invoke the collateral order doctrine. *Digital*, 511 U.S. at 873. And these

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[5] State-level entities are also entitled to the *Parker* defense, but their *sovereign* interests are protected by Eleventh Amendment immunity against damages claims and the concomitant right to an interlocutory appeal when that immunity is denied. *See Metcalf & Eddy*, 506 U.S. at 147. By contrast, if a state-level defendant sought to appeal the denial of a *Parker* motion against an antitrust claim for injunctive relief not barred by sovereign immunity, *see Ex Parte Young*, 209 U.S. 123 (1908), it would have no greater claim to an immediate appeal than in a case where an action to enjoin an allegedly preempted state law was dismissed—a circumstance where an appeal would plainly be unavailable.

interests were equally present in *Swint*, where the Court rejected the application of the collateral order doctrine to a defense that, like the *Parker* defense, was specifically crafted to protect "instrumentalit[ies] of state administration." *Monell*, 436 U.S. at 696.

Similarly, deferring appellate review until final judgment will not imperil "government efficiency and effectiveness," Pet. Br. 35, or "impel[] officials toward decisions that minimize the prospect of their being sued rather than decisions that best advance the public interest," *id.* at 37. In the qualified immunity context, these concerns reflect the threat that "*personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." *Owen*, 445 U.S. at 655-56. This "interference with proper government operations" rationale "loses its force when it is the municipality, in contrast to the official, whose liability is at issue." *Id.* at 655; *see id.* at 656. Thus, while concerns about the impact of *individual* liability for civil rights violations have justified both creation of official immunity doctrines and application of the collateral order doctrine when such immunity is denied, *see Mitchell*, 472 U.S. at 528-29, municipalities facing similar claims have received only a merits defense that does not qualify for interlocutory appeal, *see Swint*, 514 U.S. at 42-43; *Owen*, 445 U.S. at 650. For the same reason, the prospect that substate entities may face antitrust liability does not create a sufficient prospect of distorting the judgment of their officers and employees to justify immediate appeal.

On the flip side, the potential impacts on the exercise of judgment by individual public officers and employees are ameliorated not only by the unlikelihood that they would be named as antitrust defendants individually, but also by the probability that many such individuals would be entitled to a defense against any monetary antitrust remedies under the Local Government Antitrust Act, 15 U.S.C. §§ 34-36, or to qualified immunity if they were employed by a public entity that did not meet that Act's definition of a "local government," *see N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1115-16 (2015) (explaining that application of the Sherman Act to a state agency should not affect citizen participation because "agency officials ... may ... enjoy immunity from damages liability"). The availability of such defenses for employees renders fears that individuals may be unwilling to serve or that their judgment may be clouded "totally unwarranted." *Owen*, 445 U.S. at 654 n.38.

Petitioner also invokes the high costs of antitrust litigation. Pet. Br. 37-38. This Court, however, has rejected the interest in avoiding litigation costs as an important public interest justifying an immediate appeal. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (denying the application of the collateral order doctrine to orders denying class certification). A contrary rule "would apply equally to the many interlocutory orders in ordinary litigation ... that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* at 470. That the defendant here is a quasi-governmental entity, moreover, does not change the equation: The Court in *Will* made clear that the government's interest in "abbreviating litigation" is

insufficient to overcome the final judgment rule "whenever the Government ... lost an early round that could have stopped the fight." 546 U.S. at 354.

Finally, to the extent that petitioner's concern is that antitrust liability may motivate substate entities to take steps to avoid potential antitrust violations at the expense of "the public interest," Pet. Br. 37, its argument is not with the final judgment rule, but with Congress's judgment that the *Parker* defense permits such entities to be held liable (consistent with the significant limits imposed by the Local Government Antitrust Act, 15 U.S.C. §§ 34-36) when their anticompetitive behavior is not attributable to the state. *See N.C. State Bd.*, 135 S. Ct. at 1111 ("[U]nder *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants."). As under civil rights statutes, "[c]onsideration of the municipality's liability for [Sherman Act] violations is quite properly the concern of its elected or appointed officials," and "a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with [statutory] mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Owen*, 445 U.S. at 656 (discussing section 1983).

III. Denial of a motion to dismiss based on *Parker* is generally not "conclusive."

Although petitioner's failure to satisfy the requirement that an appealable collateral order be effectively unreviewable after final judgment is

decisive here, it is not the only element of the *Cohen* doctrine pertinent to the outcome. An interlocutory order may be immediately appealed under the collateral order doctrine only if it "'conclusively determine[s] the disputed question,'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand*, 437 U.S. at 468), or, put another way, constitutes a "fully consummated decision," *Cohen*, 337 U.S. at 546. The conclusiveness requirement gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free from second-guessing by the appellate courts in the midst of litigation. *See Cunningham v. Hamilton Cty.*, 527 U.S. 198, 203-04 (1999); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

Whether a nominally public entity like petitioner must satisfy the active supervision requirement of the *Parker* defense, and, if so, whether it has been satisfied, are determinations that turn on facts, as petitioner acknowledges. *See* Pet. Br. 22 (observing that "a defendant may sometimes fail this test on factual grounds"). Because of these factual questions, which cannot be definitively resolved at the dismissal stage, district court decisions denying motions to dismiss on this issue are not ordinarily conclusive.

A. Whether and how the "active supervision" requirement applies turns on facts.

Parker extends to actions of an entity that is not the state itself, but is acting under an affirmative state regulatory policy to displace competition, *City of Columbia*, 499 U.S. at 370, if it can demonstrate that its actions "are an exercise of the State's sovereign

power," *N.C. State Bd.*, 135 S. Ct. at 1110. In keeping with *Parker*'s "disfavored" use, *id.*, however, the Court has strictly limited the circumstances in which the defense is available to such entities, under a two-part test first set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980): "[F]irst, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *N.C. State Bd.*, 135 S. Ct. at 1112 (citation omitted).

The second prong, the requirement of active state supervision, "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46. Thus, where an entity can demonstrate that there is no "real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State," *id.* at 47, the Court has crafted a "narrow exception" that "excuse[s]" the actor from satisfying the active supervision requirement, *N.C. State Bd.*, 135 S. Ct. at 1112-13. For example, in *Hallie*, a prototypical city government with general regulatory powers, general electoral accountability, and no private price-fixing agenda, and that was not controlled by market participants, was excused from satisfying the active supervision requirement. *See Hallie*, 471 U.S. at 46-47.

Subsequently, in *North Carolina State Board*, this Court cautioned that *Hallie* does not mean that all nominally public entities are exempt from the active supervision requirement. 135 S. Ct. at 1113-14. Rather, because "[t]he need for supervision turns not

on the formal designations given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade," a public entity is only excused if it can show that, like a "*Hallie* city," it (1) is not "controlled by market participants," (2) is "electorally accountable," (3) has "general regulatory powers," and (4) has "no private price-fixing agenda." *Id.* at 1114. Because those entitled to the application of the *Parker* defense "will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions," this Court has stressed that it is "all the more necessary to ensure the conditions for granting [it] are met in the first place." *Id.* at 1113.

The "narrowness" of the exception to application of the active supervision requirement ensures that most non-state entities invoking the *Parker* defense must make an evidentiary showing of "[a]ctual state involvement" to qualify. *Id.* Whether the state has engaged in active supervision turns on "whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *Id.* at 1116 (citations omitted). Although "[i]n general ... the adequacy of supervision ... will depend on all the circumstances of a case," *id.* at 1117, this Court has identified several "constant requirements": The state supervisor (1) "must review the substance of the anticompetitive decision, not merely the procedures followed to produce it," (2) "must have the power to veto or modify particular decisions to ensure they accord with state policy," and (3) "the state supervisor may not itself be an active market participant." *Id.* at 1116-17. Because the "mere potential for state

supervision is not an adequate substitute for a decision by the State," *id.* at 1116 (internal quotation marks and citation omitted), these requirements put a substantial factual burden on the defendant.

In sum, because the right to invoke *Parker* "does not derive from nomenclature alone," courts must engage in "an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives" before approving of the defense. *Id.* at 1113-14. This inquiry into whether the active supervision requirement applies and has been satisfied is necessarily fact-specific, looking to particular facts about a specific entity and its conduct, as well as the specific facts about the state's supervision of that entity.

B. A decision denying a motion to dismiss based on the absence of active supervision for a nominal public entity is often not the district court's final decision on the issue.

In *Cohen*, this Court explained that, because appellate courts exercise "a power of review, not one of intervention[,] [s]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." 337 U.S. at 546. Thus, to justify an interlocutory appeal of a collateral order, there must be, among other things, "nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion." *Mitchell*, 472 U.S. at 527. As petitioner recognizes, where a legal question "turns in part on the facts," Pet. Br. 18, a district court denial of a motion to dismiss on the issue is ordinarily not conclusive.

As explained above, with respect to public entities that are not prototypical "*Hallie* cities," the active

supervision inquiry will generally be particularly fact-intensive. The existence of factual issues as to both the nature of the defendant and the degree of state supervision will necessarily render district court decisions on these issues at the motion-to-dismiss stage tentative.

The course of this litigation illustrates these points. This Court long ago found that petitioner here differs in many respects from the kinds of entities it subsequently excused from the active supervision requirement in *Hallie*. *See Ball v. James*, 451 U.S. 355, 366 (1981). Petitioner is "essentially" a "business enterprise[], created by and chiefly benefiting a specific group of landowners," *id.* at 368, that "does not exercise [general] governmental powers," *id.* at 366, and that uses a property-based voting scheme that is not required to comply with the one-person, one-vote standard, *id.* at 366-67; *see id.* at 370.

Because these facts would appear to take petitioner outside the category of *Hallie* municipalities, respondent's complaint alleged that petitioner is not actively supervised by the state. J.A. 18 (¶42), 23 (¶65). Relying on *Parker*, petitioner moved to dismiss. Applying the standard applicable at the motion-to-dismiss stage, the district court denied the motion. And in doing so, the court alluded to the tentative nature of its decision by noting that respondent's allegations were "all that is necessary *at this stage*." Pet. App. 67a (emphasis added). When petitioner nonetheless appealed and sought a stay of proceedings in the district court, the court noted again that it "did not make a final decision on the state-action doctrine" and that petitioner could raise the issue again "at summary judgment." Pet. App.

33a n.7. And indeed, petitioner has done so. *See* Mot. for Summ. J. at 28-30, *SolarCity Corp. v. Salt River Proj. Agric. Improv. & Power Dist.*, No. 15-CV-00374 (D. Ariz. Oct. 13, 2017), ECF No. 287.

Where, as here, a nominal public entity quite unlike the prototypical "*Hallie* city" invokes the *Parker* defense, the fact-intensive nature of the inquiry will ordinarily require denial of the defense at the motion-to-dismiss phase. As the district court recognized, however, such a denial is not necessarily the court's "final" word on the issue, as the defendant is "free to raise" it again in a motion for summary judgment. Pet. App. 33a n.7. Such a "tentative" ruling, *Swint*, 514 U.S. at 42 (quoting *Cohen*, 337 U.S. at 546), does not satisfy the requirements for immediate review under the collateral order doctrine.

Petitioner claims that because this Court looks at "the class of claims, taken as a whole," the grounds for the district court's denial of the *Parker* defense in this case are irrelevant. Pet. Br. 17. To be sure, the Court "decide[s] appealability for categories of orders rather than individual orders." *Johnson v. Jones*, 515 U.S. 304, 315 (1995). But that observation by itself neither defines what category is at issue nor answers the question whether a particular order in a potentially appealable category is sufficiently conclusive to qualify for appeal. To make those determinations, this Court necessarily must look to the district court's opinion.

The nature of a district court's order is often critical to the Court's categorization of it for purposes of appeal. For example, although decisions denying qualified immunity based on a legal determination that there was a violation of "clearly established" law

are immediately appealable, *Mitchell*, 472 U.S. at 528-30, decisions denying qualified immunity based on sufficiency of the evidence are not, *see Johnson*, 515 U.S. at 313. Similarly, orders *granting* stays or dismissals pursuant to *Colorado River* abstention are immediately appealable, but orders *denying* the same stays or dismissals are not. *See Gulfstream*, 485 U.S. at 277-78 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). Therefore, regardless of whether purely legal aspects of decisions involving the *Parker* defense could be considered "final" for purposes of the collateral order doctrine, *but see* Resp. Br. 48-53, the inherently fact-specific questions whether and how the active supervision requirement applies to a specific entity's unique conduct and the state's supervision of that conduct do not fit the bill. Here, the district court held that petitioner had failed to show—on the allegations of fact before the court—that it satisfied the active supervision requirement. That fact-specific decision, which the court noted was not "a final decision on the state-action doctrine," Pet. App. 33a n.7, does not fall into a category that satisfies the requirements for making an exception to the final order rule, and would be too tentative to be appealable even if it did.

In any event, if the "class of claims" here were, as petitioner urges, defined as "denials of motions to dismiss based on *Parker*," the fact that many such orders will be tentative, because they turn on factual issues related to active supervision, is a strong reason to deny appealability for the entire category. Because questions critical to most invocations of *Parker* inherently defy conclusive resolution at the motion-to-dismiss stage, denials of *Parker* motions to dismiss

should remain categorically ineligible for appeal under the collateral order doctrine.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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